



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Eagle Systems--Reconsideration

File: B-245741.2

Date: November 8, 1991

Kathleen D. Schildbach for the protester, Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Dismissal of protest as untimely is affirmed since protest of defective specifications must be filed prior to bid opening, and protester, despite having sufficient time to do so, did not file protest until after bids were opened.

DECISION

Eagle Systems requests reconsideration of our dismissal of its protest, concerning the Department of Health and Human Services, Indian Health Service's (IHS) invitation for bids (IFB) No. 246-91-B-0033. We found the protest was filed untimely. We affirm our dismissal.

The IFB was synopsisized in the Commerce Business Daily on July 24, 1991, and again, with corrections, on August 16. The IFB sought a contractor to develop, establish, and conduct an AIDS conference. Eagle received a copy of the IFB on September 6, and submitted a list of questions to the agency concerning some of the IFB's terms on September 11. The bid opening was scheduled to take place at 2:30 p.m. on Monday, September 16, in Oklahoma City, Oklahoma. Eagle called the IHS contracting specialist listed on the IFB by telephone and attempted to get answers to its questions. The protester states that it was finally told "after 5 p.m." on Friday, September 13, that the questions would not be answered. Although the IFB called for sealed bids, Eagle prepared and submitted a "cost proposal" and a "technical proposal." The protester prefaced its "technical proposal" with the questions it had previously submitted, a discussion of those questions, and complaints about the agency's contracting procedures.

On September 19, 3 days after the scheduled bid opening, Eagle filed its protest with our Office contending that IHS officials had refused to answer its questions, "all of which had a direct impact on the cost of this fixed-price contract." We dismissed the protest as untimely, since our Bid Protest Regulations require protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening to be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991); Manatts, Inc., B-237532, Feb. 16, 1990, 90-1 CPD ¶ 287.

In its request for reconsideration, Eagle contends that it was not aware of any impropriety in the solicitation until after 5 p.m. on September 13, when it was advised that its questions would not be answered, and that "a protest could not have been made or reached GAO after 5 p.m. on September 13."

The basic issue raised by Eagle concerns allegedly defective specifications, which Eagle sought to clarify by its questions. Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1), supra. Here, based on the questions Eagle submitted, it is clear it believed the solicitation had omitted critical information and was therefore defective. For example, Eagle requested information about the number of pages to be reproduced for the conference packet, graphic design for the conference, amounts to be allocated to pay for speakers, and the number of colors to be used in printing conference materials. Eagle stated that the above information was integral to the preparation of its "cost proposal."

However, in response to the protester's request for information, the agency did not take any action to delay bid opening or give any indication it intended to respond to Eagle's questions or clarify the specifications. Thus, as bid opening neared, the protester knew or should have known that the information it sought would not be provided sufficiently before bid opening and therefore should have protested either to the agency or to our Office prior to the bid opening time. See American Training Aids, Inc., B-232291, Dec. 19, 1988, 88-2 CPD ¶ 600.

We have recognized an exception to the requirement that a protest based on alleged improprieties in the solicitation be filed before bid opening when, as a result of extremely limited time periods, circumstances do not permit filing before bid opening. See, e.g., Ampex Corp., B-190529, Mar. 16, 1978, 78-1 CPD ¶ 212 (time for receipt of proposals was practically simultaneous with the solicitation, the entire process apparently taking only 10 minutes);

Culligan, Inc., 58 Comp. Gen. 307 (1979), 79-1 CPD ¶ 149 (protester received IFB amendment less than 3 hours before bid opening). However, we do not agree that the protester did not have sufficient time to file a protest before bid opening. The protester states that it spent the time that remained after the IHS's refusal to respond to Eagle's questions preparing its proposal (which was not required, as the solicitation required sealed bids). In view of the fact that the protester had sufficient time to submit its proposal to the IHS in Oklahoma City, which proposal included essentially all of the information that would have been necessary for preparing a protest submission, we believe that the protester had a reasonable opportunity to file its protest before bid opening, either with the agency or this Office. See Allen and Vickers, Inc., B-216746.2, Nov. 26, 1984, 84-2 CPD ¶ 559.

The protester alleges it was given conflicting information regarding our timeliness requirements when it called our Office. Eagle's account of its conversation with our staff during which Eagle allegedly was given erroneous advice is impossible to confirm since Eagle does not identify any individual with whom it spoke. However, under the law a protester is on constructive notice of the rules concerning the proper time for filing a protest, even where allegedly erroneous information about protest regulations is provided by agency personnel, as our Bid Protest Regulations are published in the Federal Register. Whelen Eng'g Co., B-239189, Aug. 1, 1990, 90-2 CPD ¶ 89.

The dismissal is affirmed.


Ronald Berger
Associate General Counsel